IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1529 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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POPATLAL M. BHANSHALI
Versus
KISHANLAL SHIVLAL MODHIYA

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Appearance :
MR ASIM J PANDYA for the petitioner
MR JT TRIVEDI for the respondent

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 21/10/2005

ORAL JUDGMENT

1. The petitioner – original plaintiff – appellant landlord is before this Court being aggrieved of a judgment and decree in Regular Civil Suit No.27 of 1986,

passed by the learned Civil Judge (J.D.), Zalod dated 18.08.1989, whereby the suit of the plaintiff for possession was dismissed. The learned Judge was pleased to order that plaintiff to recover @ Rs.21 per month the rent with effect from 01.06.1983, totaling to Rs.672/-. It was further ordered that if the defendant had deposited any amount in the Court, the same should be adjusted.

2. The plaintiff – landlord being aggrieved of the same, approached the Court of 2nd Extra Assistant, Panchamahals at Godhra by filing Regular Civil Appeal No.59 of 1989, which too was dismissed by judgment and order dated 31st July 1993 confirming the judgment and decree passed by the learned trial Judge.

3. Mr.Asim J.Pandya, learned advocate for the petitioner vehemently submitted that the Courts below have erred in holding that the case falls under Section 12(3)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as, 'the said Act'). He submitted that the plaintiff had contended that the case falls within under Section 12(3)(a) and not under Section 12(3)(b). The learned advocate submitted that the learned Judge, on a single stray sentence in the

cross-examination of the plaintiff (Exh.142), wherein the plaintiff stated that, “I am taking Rs.21 in total towards the rent which includes all taxes”, has held that the deposition of the landlord should be construed to mean that, 'the rent payable by the tenant was not payable by month and, therefore, the case is governed by Section 12(3)(b) and not Section 12(3)(a) of the Act. He submitted that the learned Judge has committed an error in so doing. In support of his submission, the learned advocate relied upon a decision of the Hon'ble the Apex Court in the matter of **RAJU KAKARA SHETTY VS. RAMESH PRATAPRAO SHIROLE & ANOTHER**, reported in Judgment Toady 1991 (1) S.C. 128. The learned advocate relied upon the observations made by the Hon'ble the Apex Court in paragraph Nos.9 and 14, which are produced for the ready reference:

> “9. Mr.Tarkunde, the learned advocate for the landlord, on the other hand submitted that once the four ingredients of section 12(3)(a) were shown to be satisfied, the Court had no alternative but to decree the suit. According to him, the standard rent in respect of the demised premises was shown to be Rs.900/- per month and in addition thereto the tenant had agreed to pay a quantified sum of Rs.120/- per month by way of education cess and other taxes. It was proved as a fact that the tenant had failed to pay the rent in respect of the garage

from 1st November, 1979 and the rent in respect of the hotel from 1st June, 1983. The tenant had also failed to pay the tax amount at the rate of Rs.120/- per month from 1st June, 1983. Since there was no dispute in regard to standard rent or permitted increases in this case, the tenant was under an obligation to pay the entire amount due from him by way of rent and taxes within one month of the receipt of the eviction notice dated 31st December, 1984. Under section 12(1) of the Act a landlord is not entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, insofar as they are consistent with the provisions of the Act. Section 12(2) places a restriction on the landlord's right to sue his tenant for recovery of possession on the ground of non-payment of the standard rent and/or permitted increases due from him. According to that section no suit for recovery of possession can be instituted on the aforesaid ground until the expiration of one month next after notice in writing of the demand of the standard rent and/or permitted increases has been served upon the tenant in the manner set out in section 106 of the Transfer of Property Act. To comply with this requirement the landlord had issued a notice on 31st December, 1984 calling upon the tenant to pay the standard rent which was in arrears along with the quantified tax amount in arrears upto that date as detailed in the notice. The tenancy was terminated w.e.f. 31st January, 1985. Admittedly, the tenant did

not respond to this notice nor did he paid or deposit the amount of arrears as claims in the notice within one month of the receipt thereof. He also did not file any application for fixation of standard rent and/or permitted increases under section 11 of the Act. There was, therefore, no question of the Court specifying the amount of interim rent or permitted increases under sub-section (3) of Section 11 during the pendency of such an application. Mr.Tarkunde, therefore, submitted that the case was clearly governed by the provisions of section 12(3)(a) since indisputably the rent inclusive of the quantified tax amount was payable by the month; there was no dispute as regards the standard rent/permitted increases; the tenant was found to be in arrears of rent for more than six months and he had failed to pay or deposit the rent within one month after the receipt of the notice under section 12(2) of the Act. According to Mr.Tarkunde the submission that because the education cess was payable by the year, a part of the rent was not payable by the month and therefore section 12(3)(a) had no application is clearly misconceived, for the simple reason that in the present case the landlord as well as the tenant had by agreement quantified the amount of education cess and other taxes at Rs.120/- per month and had not left the determination of the amount to fluctuations in the tax amount from time to time. Once the quantum in respect of the tax liability is determined by agreement between the parties, the same forms part of the rent and it is not open to contend that notwithstanding the agreement that tax

amount remains payable by the year and the tenant is obliged to pay the same only after the landlord has paid the taxes to the local authority. He, therefore, contended that the case law on which Dr.Chitale had placed reliance can have no application to the special facts and circumstances of the present case.

14. The only submission which Dr.Chitale made for taking the case out of the purview of section 12(3)(a) was that the entire rent was not payable by the month which was the first condition to be satisfied for invoking the said provision. According to him, since the tenant was bound to pay education cess and other taxes in respect of the demised premises which were payable from year to year, a part of the rent was not payable by the month and therefore the first condition of section 12(3)(a) was not satisfied. Hence, submitted Dr.Chitale, the case fell within the phrase 'in any other case', by which clause (b) of section 12(3) opens. Before we answer the submission of Dr.Chitale it may be advantageous to refer to the relevant provisions of the Maharashtra Education (Cess) Act (Maharashtra act XXVII of 1962). Section 4(a) of the said act provides for the levy and collection of tax (cess) on lands and buildings at the rates specified in Schedule A on the annual letting value of such lands or building. The primary responsibility to pay this tax is cast by section 8 on the owner of the land or building irrespective of whether or not he is in actual occupation thereof. Section 13 next provides that on payment of the amount of the tax in respect of such

land or building the owner shall be entitled to receive that amount from the person in actual occupation of such land or building during the period for which the tax was paid. Under section 15 any person entitled to receive any sum under section 13 is conferred for the recovery thereof the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to receive the same. It thus seems clear that education cess is a tax and the owner is primarily responsible to pay the same to the local authority and on such payment a right is conferred on him to recover the same from the actual occupant in addition to the standard rent in respect of the demised premises. Sub-section (3) of section 13 in terms states that the recovery of any amount of tax from an occupier under this provision shall not be deemed to be an increase for the purpose of section 7 of the Act. It is, therefore, obvious that the landlord has a statutory right to recover the amount of education cess paid by him in respect of the demised premises from the tenant-occupant and such recovery shall not be an unlawful increase under of section 7 of the Act but would squarely fall within the expressing 'permitted increases' as defined by section 5(7) of the Act. This statutory right to recover the amount of education cess in respect of the demised premises from the occupant-tenant can be quantified by agreement of parties so long as the amount quantified does not exceed the total amount actually paid by the owner by way of education cess. In the present case, it is nobody's contention that the amount of Rs.120/- per month payable by way of

education cess and other taxes was in excess of the amount actually payable under the relevant statutes to the local authority. The Gujarat High Court has taken a consistent view that where the tenant is obliged under the terms of the tenancy or by virtue of the statute to pay the tax dues to the landlord, since such taxes which form part of the rent are payable annually the case ceases to be governed by section 12(3)(a) and falls within the purview of section 12(3)(b) of the Act. In Maheshwari Mills Ltd., under the terms of the tenancy the tenant was obliged to pay the municipal taxes and property taxes in respect of the demised premises. The Court took the view that such payment was by way of rent and since the municipal taxes and property taxes were payable on year to year basis, a part of the rent was admittedly not payable by the month and, therefore, section 13(3)(a) was not attracted. In Prakash Surya the tenant had agreed to pay the municipal tax and education cess. The amount payable towards these taxes constituted rent and since the same was payable at the end of the year the Court held that the rent had ceased to be payable by the month and hence section 12(3)(a) had no application. The same view was reiterated in Vanlila's case where education cess was payable by the tenant by virtue of section 21 of the Gujarat Education Cess Act, 1962. Since it constituted a part of the rent, to be precise permitted increase under section 5(7) of the Act, it was held that it took the case outside the scope of section 12(3)(a) of the Act. In the case of Vishwambhar Hemendas also since the rent was inclusive of taxes the Court held that the case was

governed by section 12(3)(b) of the Rent Act. The Bombay High Court has expressed the same view in Muktabai's case. This Court in the Bombay Municipal Corporation's case held that while section 7 of the Act prohibits increase above the standard rent it does not prohibit the recovery of increase to which a landlord is entitled under the other provisions of the said statute, namely, increase by way of 'permitted increases'. Education cess is specifically recoverable as rent by virtue of section 13 and as sub-section (3) thereof provides that it shall not be treated as increase in rent under section 7 of the Act, there can be no doubt that such an increase falls with the definition of 'permitted increases' under section 5(7) of the Act. It, therefore, seems to be well-settled that education cess is a part of 'rent' within the meaning of the Act and when the same is claimed in addition to the contractual or standard rent in respect of the demised premises it constitutes a permitted increase within the meaning of section 5(7) of the Act and being payable on a year to year basis, the rent ceases to be payable by the month within the meaning of section 12(3)(a) of the Act. But the question still survives whether the parties can by agreement quantify the said amount and make it payable on a month to month basis provided of course the said amount does not exceeds that liability it would infringe section 7 of the Act and the excess would not be allowed as permitted increase within the meaning of section 5(7) of the Act. A right to recover a certain tax amount from the tenant-occupant under the provisions of a

statute can be waived by the owner or quantified by agreement at a figure not exceeding the total liability under the statute. If by agreement the amount is so quantified and is made payable by the month notwithstanding the owner's liability to pay the same annually to the local authority, the question is whether in such circumstances the 'rent' can be said to be payable by the month within the meaning of section 12(3)(a) of the Act? We see no reason why we should take the view that even where the parties mutually agree and quantify the tax amount payable by the tenant to the landlord on monthly basis, the rent should not be taken to be payable by the month within the meaning of section 12(3)(a) of the Act. A statutory right to recover the tax amount by way of reimbursement can be waived or limited by the holder of such right or the recovery can be made regulated in the manner mutually arranged or agreed upon by the concerned parties so long as it is not in violation of statute. If for convenience and to facilitate payment, the parties by mutual consent work out an arrangement for the enforcement of the owner's statutory right to recover the tax amount and for discharging the tenant-occupant's statutory obligation to reimburse the owner, we see no reason for refusing to uphold such a contract and if thereunder the parties have agreed to the tenant-occupant discharging his liability by a fixed monthly payment not exceeding the tax liability, the said monthly payment would constitute 'rent' payable by the month within the meaning of section 12(3)(a) of the Act. The view expressed by the Gujarat High

> Court in Vishwambar Hemandas does not, with respect, state the law correctly if it holds that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent of Rs.19.50 p.m. The mere recital in the lease that the rent is inclusive of taxes takes the case outside the purview of section 12(3)(a) of the Act. We are, therefore, in respectful agreement with the view taken by the Appellate Court and the High Court in that behalf. We, therefore, hold that as the tenant had failed to comply with the requirement of section 12(3)(a) to seek protection from eviction, the Courts below were justified in ordering his eviction."

The learned advocate submitted that the present case will also fall within the ambit of Section 12(3)(a) and there being no compliance of the ingredients set out in the Section, a decree for possession is inevitable.

4. The learned advocate also relied upon the following decisions of this Court:

1. **MANILAL ABHAJI VS. SWAMI VAISHVACHARYA GURA,** reported in 2000(2) GLR 1191.
2. **HEIRS OF KASHIBEN C.CHHAGANLAL D/O. CHIMANLAL CHHAGANLAL VS. HEIRS OF BAPULAL KALIDAS**, reported in 2001(2) GLR 1320.

In both these cases, the aforesaid judgment of the Hon'ble the Apex Court is relied upon and relying on the

observations of the Hon'ble the Apex Court, it is held that, 'nature of monthly tenancy' does not change even if the tenant was to pay the tax also.

The learned advocate strenuously submitted that when a landlord is to receive an 'X' amount by way of rent which is inclusive of taxes, it does not necessarily mean that the tenant is shouldering the burden of payment of taxes. The literary meaning of the phrase used by the landlord that he is to receive an 'X' amount is that the tenant is to pay only that 'X' amount and nothing more. Unless there is a specific understanding between the parties that, of the 'X' amount paid to the landlord, a particular amount is towards rent while the remaining amount is towards the taxes, it cannot be said that the tenant is paying the taxes. In light of this discussion, to construe that the tenant is paying the taxes also, is erroneous. It will be appropriate at this stage to again refer to the observations of the Hon'ble the Apex Court, which reads as under:

> “.....If for convenience and to facilitate payment, the parties by mutual consent work out an arrangement for the enforcement of the owner's statutory right to recover the tax amount and for discharging the tenant-occupant's statutory obligation to reimburse the owner, we see no reason

> for refusing to uphold such a contract and if thereunder the parties have agreed to the tenant-occupant discharging his liability by a fixed monthly payment not exceeding the tax liability, the said monthly payment would constitute 'rent' payable by the month within the meaning of section 12(3)(a) of the Act. The view expressed by the Gujarat High Court in Vishwambar Hemandas does not, with respect, state the law correctly if it holds that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent of Rs.19.50 p.m. The mere recital in the lease that the rent is inclusive of taxes takes the case outside the purview of section 12(3)(a) of the Act.....”

5. The learned advocate submitted that even on facts, in this case when the plaintiff was asked in his cross-examination as to whether the defendant is his yearly tenant, he had denied the same in clear words. The learned advocate submitted that if the sole stray sentence is taken into consideration, the Courts were under a bounden duty to take into consideration this later assertion also made by of the landlord.

6. The learned advocate next submitted that the Courts have erred in holding that the case will fall within the ambit of Section 12(3)(b) as a dispute regarding the standard rent is raised in the present case. He submitted that in the present case, it was in the written statement

that the dispute regarding standard rent was raised for the first time. He submitted that if the dispute of standard rent is allowed to be raised for the first time in a written statement, provision contained in Section 12 and explanation thereto stands nullified. The learned advocate submitted that in fact, that will amount to conferring a right on the tenant where legislation has not.

7. The learned advocate relied upon a decision of the Hon'ble the Apex Court in the matter of **HARBANSLAL JAGMOHANDAS & ANR. VS. PRABHUDAS SHIVLAL**, reported in 1977 (18) GLR 157. The learned advocate relied upon the observations of the Hon'ble the Apex Court in paragraph Nos.24 and 25. The same are reproduced as under:

> “24. The view of the Bombay High Court overlooks the limitation of time within which a dispute is to be raised as to standard rent. The view of the Bombay High Court is that disputing within one month of the service of the notice terminating the tenancy is one mode of raising a dispute and there is another mode of raising the dispute at any stage of the suit. The view of the Bombay High Court nullifies the provisions contained in sec.12 and Explanation thereto and confers a right on the tenant where the legislation does not contemplate such a right.

> 25. The provisions in sec. 11(3) of the Act deal with order which may be passed by the Court during the pendency of the application disputing the rent. Provisions in sec. 11(4) of the Act deal with orders which may be passed consequent upon dispute as to rent. It is only when an application disputing rent is made within the time contemplated by Explanation I to sec.12 of the Act that the provisions in sub-sec. (3) and (4) of sec.11 are attracted."

The learned advocate submitted that it is mandatory under the provisions of Section 12 that a dispute of standard rent be raised as prescribed therein. The same cannot be raised at any time. The learned advocate also referred to the decision of the Hon'ble the Apex Court in the matter of **SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND CIRCHAND SHROFF (DECEASED)**, reported in 1968 (9) GLR 759 and the decisions of this Court in the cases of **RASIKLAL NARMADASHANKER TRIVEDI VS. DILIPKUMAR VASANTBHAI KOTAK & ANR.**, reported in 1980 (21) GLR 741, **GANPAT LADHA VS. SASHIKANT VISHNU SHINDE**, reported in 1978 (19) GLR 502.

8. The learned advocate submitted that besides, the aforesaid contention on which the petitioner shall succeed, there is an important aspect on facts also. He submitted that earlier there was a litigation between the parties and the same was disposed of by a 'compromise'.

In the said compromise, the parties had agreed to an 'X' amount as rent. That being so, in the present litigation, it cannot be contended that the said 'X' amount is not the standard rent. No such pleas be allowed and ought not to have been allowed by the learned Judge. He submitted that if not under the principle of 'res judicata', then under the principle of estoppal the defendant ought to have been restrained from raising the dispute of standard rent. He submitted that it ought to have been held that the defendant is estopped from taking such plea. In support of his submission, the learned advocate relied upon a decision of this Court in the matter of **JAYANTILAL CHUNILAL PANCHOLI VS. BAI JASHODA D/O. MADHU DULLABH**, reported in 1975 (16) GLR 146.

The learned advocate submitted that in that case, the standard rent was fixed with the consent of the parties and the Court had observed that if the parties have agreed to fix a particular amount as standard rent, there is no reason why the Court cannot think that it is just. More particularly when in respect of premises let out for the first time, the contractual rent is the standard rent unless the Court, upon a dispute having been raised by the tenant, fixes a different amount as the standard rent.

The learned advocate submitted that in the present case, when the parties had agreed to an 'X' amount as rent and no plea was ever raised about the rent being excessive or exorbitant, it is not open for the defendants to raise the plea of standard rent in the present proceedings.

9. Mr.J.T.Trivedi, learned advocate for the respondent strenuously submitted that the case falls within ambit of Section 12(3)(b). He submitted that even if the parties had agreed to an 'X' amount as rent in the earlier proceedings, it cannot be said that there was an adjudication/determination of standard rent. Therefore, it should be held that the defendant – tenant could not pay the rent on receipt of the notice under Section 12(2). Besides, he submitted that in the present case, there was a specific issue raised, i.e. issue No.11 for determination of standard rent and the Court answered the said issue for the first time only at the time of final judgment and, therefore, defendant-tenant is rightly not not held to be, 'not ready and willing to pay the rent'. He submitted that in view of the aforesaid facts, viz. an issue being raised about the standard rent and it is determined at the time of final hearing of the suit, a

lenient view is required to be taken in the matter. The learned advocate submitted that if the amount which is already deposited by the tenant is short of anything, the tenant is required to be given an opportunity to pay up the shortfall and the judgment and decree of the Courts below refusing the possession of the suit premises is required to be confirmed by this Court.

10. The learned advocate for the respondent-original defendant -tenant relied upon a decision of this Court in the matter of **RUPABEN WD/O KATHTHU DHANJI & ANR. VS. BABUBHAI DEOJIBHAI**, reported in 1983 (1) GLR 263 and contended that till the standard rent is decided by the Court, a tenant is not able to know at what exact rate he is to deposit the rent. He submitted that in such circumstances, when a tenant is not able to deposit the rent in full, protection under Section 12(3)(b) be extended to the tenant.

11. The aforesaid submission of Mr.Trivedi cannot be accepted, firstly for the reason that the present case does not fall within Section 12(3)(b) because it is on the record of the case that the rent was payable by month, secondly there was no dispute of standard rent, because the contention of standard rent is sought to

raised for the first time in the written statement, thirdly the tenant neither replied to the notice under Section 12(2) of the Act nor raised a dispute regarding the standard rent. In view of the decision of the Hon'ble the Apex Court in the matter of Harbanslal (Supra), the dispute of standard rent cannot be raised at any time much less in the written statement. Thus, in the present case, there was no dispute of the standard rent. Merely because the learned Judge entertained the dispute raised in the written statement, framed an issue and decided the same, will not alter the position. The dispute of standard rent could not have been raised in the written statement under the law. The dispute of standard rent is to be raised in response to the notice under Section 12(2) of the Act. This settled legal position holds the field even if the peculiar facts of the case are not taken into consideration, viz. that is in earlier proceedings, the parties had compromised and 'X' amount was agreed to be the rent. In those earlier proceedings and the execution proceedings arising from the same compromise decree, the defendant-tenant had not raised any dispute of the standard rent.

12. Having heard the learned advocates for the parties, this Court finds that the Courts below have erred in

holding that the case falls within the ambit of Section 12(3)(b) and the plaintiff is not entitled for decree for possession. On giving anxious thought to the facts of the case, this Court feels that the case did not fall within the ambit of Section 12(3)(b), but is squarely falls within Section 12(3)(a) and there being no compliance of the conditions prescribed therein, a decree for possession is to be passed. Accordingly, the judgments and decrees of the Courts below are quashed and set aside and the defendant is directed to hand over peaceful and vacant possession of the premises. Rule is made absolute with no order as to costs.

13. At this stage, Mr.Trivedi, learned advocate for the respondent – tenant submitted that looking to the peculiar facts and circumstances of the case, the defendant be granted reasonable time to vacate the premises. According to him, reasonable time will be anything between one and half year to two years.

14. Mr.Pandya, learned advocate for the petitioner-landlord submitted that this is a case wherein the suit was filed in the year 1986 and plaintiff-landlord has been waiting for the possession of his premises for almost two decades by now. He submitted that, therefore,

this request does not warrant any consideration at the hands of this Court.

15. Taking into consideration the fact that any person who has to vacate his residence has to undergo an agony, the defendant is granted 15 months time to vacate the premises, on condition that the defendant shall file the usual undertaking before this Court and in addition to that, the defendant-tenant shall pay the arrears, if any on or before 30th November 2005. If the arrears are more than Rs.500/-, the same be paid on or before 31st December 2005. The time granted shall start from 1st November 2005. It is clarified that if the tenant fails to comply with the aforesaid condition of filing usual undertaking and payment of arrears of rent, the decree for possession will become executable forthwith.

(RAVI R.TRIPATHI, J.)

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